IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 9304 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DEVENDRABHAI RATILAL MALVANIA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 9304 of 2001

MR SATYEN B RAWAL for Petitioner No. 1

MR SS PATEL, APP for Respondent No. 1

MR NISHITH THAKKAR for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/07/2003

ORAL JUDGEMENT

The petitioner herein has preferred this petition

before this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code") for quashing and setting aside a complaint filed by respondent no.2 herein before the learned Chief Judicial Magistrate at Surendranagar, being Criminal Case No.804/2001 and also an order passed in M.Case (Inquiry) No.5/2001.

2. It seems that the second respondent has filed the aforesaid criminal case before the said Court for offences punishable under Sections 406, 418 and 420 of IPC against the present petitioner. It appears that the petitioner and the second respondent are real brothers. Both of them are shown to be the residents of Surendranagar. In the said complaint before the said Court, the second respondent has stated that the present petitioner is the younger brother of the second respondent; that the petitioner was looking after the cheque book, passbook, slip book etc. for the years 1999, 2000 and 2001. It is also alleged in the said complaint that the said accused person i.e. the present petitioner, had not handed over the properties mentioned in the complaint to the second respondent and therefore, the second respondent instituted the said complaint against the present petitioner, saying that the aforesaid offences have been committed by the petitioner, by not returning the said properties to the second respondent. On receiving the said complaint, process was issued and the present petitioner appears to be attending the said complaint. However, the petitioner felt aggrieved by the said order of process, registering the complaint against him and therefore, he has preferred this petition before this Court for quashing the said criminal case against him.

3. It has been mainly contended by the petitioner herein that the dispute between the parties is of a civil nature and therefore, no criminal element is shown to be existing and consequently, the complaint does not disclose any offence against the petitioner and therefore, the complaint is required to be quashed. The petitioner has, therefore, prayed that in view of the above position, when no offence is made out against the petitioner, the complaint may be quashed, by exercising inherent jurisdiction vested in this Court by Section 482 of the said Code.

4. Notice was issued to the respondents and in response to the service of Notice, Mr.S S Patel learned APP has appeared for the State and he has supported the case of the complainant, second respondent, saying that

when prima facie case is made out in the complaint, the complaint cannot be quashed by this Court. Respondent no.2 was represented by Mr.N Thakkar learned advocate appearing on behalf of Mr.Y S Lakhani. The learned advocates for the parties have argued the matter at length. The facts are not much in dispute. The second respondent has filed the aforesaid complaint against the petitioner before the aforesaid Court. It is also not in dispute that the petitioner and the second respondent are real brothers carrying on business at Surendranagar. It is also not in dispute that the present petitioner was having some business terms with the second respondent also. These facts are not very much in dispute.

5. However, there is a mention in the complaint that because of the relationship between the two persons, certain books of accounts and other properties were entrusted by the second respondent to the petitioner and the petitioner has not returned the same and has misappropriated the same and therefore, has committed the aforesaid offences. It has, however, been stated in the complaint that the petitioner being the real brother of respondent no.2, had come to understand that he would preserve the properties properly. Thereafter, he did not hand over the property to the contesting respondent and committed criminal breach of trust as well as cheating and thereby committed the aforesaid offences.

6. During the course of his argument, learned advocate for the petitioner has submitted that in order to commit an offence punishable under Section 406 of IPC, it would be necessary that there should be an entrustment of a valuable security by the complainant to the accused person and thereafter, there should be criminal misappropriation in respect thereof. It would be difficult to agree with the said argument advanced by the learned advocate for the petitioner. Section 405 IPC does not require that only a valuable security should have been entrusted by a complainant to an accused person. Section 405 IPC makes it clear that when a person has been entrusted with a property and if the said person dishonestly misappropriates or converts the property for his own use, then it can be said that offence is made out. In the present case, we find that if we read the complaint, there is a mention that the books of accounts, ornaments, certificates etc. were entrusted by the complainant to the accused and the accused did not return the same and has used it for his own purpose. This would show that atleast there is prima facie case of offence punishable under Section 406 IPC. Even if we take it that the case about the offence

punishable under Section 420 IPC is weak, the weakness of the case at this stage cannot be considered and therefore, it would be open to the complainant to produce evidence before the trial court and prove his case at the relevant point of time.

7. It has also been argued by the learned advocate for the petitioner that the complaint does not disclose as to how the petitioner had misused the properties. In other words, the argument is that the particulars of misuse have not been provided in the complaint. Now, once it is stated in the complaint that certain properties mentioned in the complaint were entrusted to the petitioner by the second respondent and the petitioner did not return them to the second respondent but in fact used it for his own purpose, then it can be said that there are prima facie allegations, so as to cover the offence punishable under Section 406 IPC. In my opinion, all particulars as to how the misuse has taken place are not required to be given in the complaint.

8. It has also been contended that it is also not stated as to how the Fixed Deposits Receipts have been misused by the petitioner. This will again be a matter of disputed question of fact, which can be dealt with and decided by the Court concerned at the relevant point of time. Ultimately, if it is found that the petitioner has not misused the position and has not misappropriated the properties, then in that event, he may not be convicted. But, at present we are not required to go into those details, while exercising inherent jurisdiction under Section 482 of the said Code. It has then been contended by the learned advocate for the petitioner that the facts of the present case squarely fall within the four corners of the case in State of Haryana V/s. Bhajanlal, reported in AIR 1992 SC 604 and therefore, the complaint is required to be quashed. As a matter of fact, he has drawn some paragraphs from the said judgment at page 4, which may be reproduced for ready reference as follows;

> "(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
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> (2) Where the allegations in the First Information Report and other material, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying and investigation

by police officers under S.156(1) of the Code except under an order of a Magistrate within the purview of S.155(2) of the Code.

(3) X X X

(4) X X X

(5) Where the allegations made in the F.I.R. complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive of wreaking vengeance on the accused and with a view to spite him due to private and personal grudge".

9. On a bare reading of the first paragraph, it is clear that if the allegations made in the F.I.R. are taken at their face value and accepted in their entirety and if no prima facie case is made out, then the Court should exercise powers under Section 482 of the said Code. There is no difficulty with the said observation of the Hon'ble the Supreme Court. At the same time, when the complaint prima facie shows that there was an entrustment and criminal misappropriation with respect to certain movable properties, then it can be said that prima facie offence is made out and therefore, the complaint cannot be quashed.

9.1 In para 2 of the said judgment referred to hereinabove, it has been observed that where the allegations made in the FIR and other materials accompanying the FIR, do not disclose a cognizable offence justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code; then the Court should exercise powers under Section 482 of the said Code. Now, this is not relevant because it is very clear that the offence alleged against the petitioner are cognizable offences and therefore, there is no question of obtaining permission from the Magistrate concerned under Section 155(2) of the said Code.

9.2 It is further mentioned that if the

allegations made in the FIR are so absurd and inherently improbable, then in that event also, the Court should exercise the powers under Section 482 of the said Code to quash the FIR. Here, the allegations made are not of that nature and therefore, even this observation will not apply to the facts of the case on hand.

9.3 It is further mentioned that if a criminal proceeding is manifestly attended with malafide on the part of the complainant, then also the Court should exercise powers under Section 482 of the said Code for quashing the FIR. Again, the question of malafide will be a question of fact and unless it is borne out from the record, it would not be possible for this Court to hold that there is a prima facie case of malafide intention on the part of the complainant.

9.4 It is further contended that there was some dispute about payment of money between the two brothers. This would again be a matter of factual dispute and this Court is not required to enter into factual disputes at this stage. Disputed questions of fact cannot be entertained in a petition like the present one under Section 482 of the Code. It is true that in reply to the Notice at page 18 certain factual averments have been made stating that the petitioner has made some payment of dues and even the receipts were also obtained. Again, this will be a question of fact which can be dealt with and decided at the relevant point of time.

10. It has further been argued that the properties described in the complaint are not in possession of the petitioner. This would again be a question of fact. If the entrustment is not proved then the offence would not be proved and if the entrustment is proved then the complaint and the fact that the accused has committed criminal misappropriation in respect of the said property, has to be proved. This would again be a question of fact which can be dealt with and decided at the relevant point of time.

11. The learned advocate for the petitioner has relied upon a decision of the Hon'ble the Supreme Court in Medchl Chemicals & Pharma (P) Ltd. V/s. Biological E. Ltd. And Others reported in (2000)3 SCC 269. This decision clearly says that when there is a civil dispute

as well as a criminal dispute, then the Court should consider as to whether on the fact situation "civic profile" outweighs the "criminal outfit". It seems that in view of the allegations made in the complaint, it cannot be said that the parties have only a civil dispute and there is no element of criminal offence made out in the complaint.

12. The learned advocate for the petitioner has also relied upon a decision of this Court in Mistry Jethabhai Nanjibhai V/s. Bipinchandra Parshottam and Another reported in 1967 GLR 640. There it has been observed that a charge of misappropriation cannot lie in respect of one item of money received by a managing partner of a partnership business. It is, further observed that before the accounts are taken there cannot be a criminal complaint of misappropriation of a sum admittedly received during the partnership. Now, the present case does not relate to a partnership. The second respondent has clearly said that the properties in question belong to the second respondent and they were in the possession of the second respondent; that they were entrusted to the petitioner and the petitioner has misappropriated the same. Therefore, there is no allegation that there was a partnership business and the properties belong to the partnership firm. In that view of the matter, this decision also does not come to the rescue of the petitioner.

13. It is, further submitted by the learned advocate for the petitioner that the partnership subsists between the two brothers. This would again be a question of fact and it can be dealt with and decided in accordance with law at the relevant point of time. Simply because the petitioner states that there is a partnership between the two brothers and the said partnership still subsists, it is not possible to accept the said fact and it becomes a disputed question of fact and it cannot be dealt with and decided by this Court at this stage.

14. In above view of the matter, it appears that the complaint does make out a case of criminal misappropriation in respect of ornaments, books of accounts, Fixed Deposit Receipts etc.. It is prima facie revealed from the complaint that the properties were entrusted to the petitioner and the petitioner has misappropriated the same dishonestly. Whether it is a matter of dishonest misappropriation, is a question of fact, which cannot be dealt with and decided by this Court in this petition. In that view of the matter, it cannot be said that the complaint does not disclose a

prima facie case and that no offence is prima facie made out against the petitioner. In that view of the matter, the complaint cannot be lightly brushed aside.

15. With respect to malafide on the part of the complainant, we come across a decision in State of Maharashtra and others V/s. Ishwar Piraji Kalpatri and others reported in AIR 1996 SC 722. There it has been observed that mere fact that the complainant is guilty of malafide would not be a ground for quashing the complaint. Therefore, even if it is accepted that there is a prima facie case of malafide on the part of the complainant, it would not be a ground for quashing the complainant.

16. In above view of the matter, no case is made out for quashing the complaint. Therefore, the petition cannot be allowed and the complaint cannot be quashed. For the foregoing reasons, this petition is ordered to be dismissed. Notice is discharged.

(D. P. Buch, J.)

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